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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

MICHAEL M. DOWNING, and
JOE S. DUNCAN

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED:

I. Whether the principles of constitutional collateral estoppel articulated in *Ashe v. Swenson*, 396 U.S. 436 (1970), preclude the reprosecution of the petitioners for tax fraud charges for both of two alleged misrepresentations in petitioner Duncan's 1982 tax return when the jury's verdict clearly constituted a repudiation of the government's theory that one of the two alleged false statements was criminal violation.

II. Whether the principles of collateral estoppel articulated in *Sealfon v. United States*, 332 U.S. 575 (1947), bar the petitioners' retrial for substantive counts of tax fraud when the jury's verdict of acquittal on a charge of conspiracy to defraud the United States represents a rejection of the core of the government's case upon which the substantive counts are based.

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NO._____

MICHAEL M. DOWNING, and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Michael M. Downing and Joe S. Duncan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 7, 1989.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a - 9a) is not reported. The opinion of the district court (App. 14a - 29a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 7, 1989. A petition for rehearing was denied on October 2, 1989. See App. 10a - 11a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 5

This provision is set forth at App. 30a.

STATEMENT OF THE CASE

In September of 1981, Joe Duncan received a right of first refusal to purchase a Howard Johnson's Motel in Knoxville, Tennessee, for the sum of seven million dollars. The right of first refusal was in effect for five years, controlled 50 percent of the real estate and 40 percent of the stock in the motel, and although it recited a stated consideration of $200,000, was valued at approximately $500,000 to $600,000 by William Hitson, the founder of Days Inn of America, who had held a similar option on the property earlier in 1981.

This right of first refusal was given to Duncan at the request of Mike Downing who had inherited a right to it as a result of a previous transaction involving two other motels. In the fall of 1981, following receipt of the right of first refusal, Duncan assigned this right to Downing in return for Downing's agreement to obtain the discharge of approximately $315,000 in debt owed by Duncan to a local Knoxville bank--United American Bank of Knoxville (UAB).

Downing discharged Duncan's debt by borrowing money from UAB through a newly-formed corporation (DESH) in which Downing owned a partial interest. The discharge of Duncan's debt was accomplished in two separate installments over two years. The first was a $200,000 payment on November 27, 1981. The second was a $115,715 payment on May 16, 1982.

Both of these transactions were reported on Duncan's tax returns for 1981 and 1982. The 1981 return reported the transaction as a short-term capital gain, describing it as "INV., HOWARD JOHNSON," the cost as zero, the gross sales price as $200,000, and the gain as $200,000. The 1982 return reflected the $115,702.28 transaction as short-term capital gain without further description.

Both returns were prepared by Downing's office.

The government began its prosecution of the petitioners in June of 1986 with a five-count indictment. The government prosecuted the case on the theory that the right of first refusal was a sham

transaction and that the two transactions which were reported on Duncan's tax returns in 1981 and 1982 as short-term capital gain were false and fraudulent because they should have been reported as ordinary income.

The government contended that the declaration of $200,000 in capital gain on the 1981 return and approximately $115,000 on the 1982 return were not only false and fraudulent statements but were part of an all embracing conspiracy to defraud the United States by obstructing the Internal Revenue Service (IRS).[1] Count 1 of the indictment charged Duncan, Downing, and C.H. Butcher, Jr.[2] with a *Klein* conspiracy to defraud the United States by impeding the Internal Revenue Service (IRS) in its

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[1] A more extended description of these alleged offenses is set forth in *United States v. Duncan*, 850 F.2d 1104, 1106-1108 (6th Cir. 1988).

[2] C.H. Butcher, Jr. plead guilty to this count of the indictment and testified for the prosecution at trial that he had participated in a conspiracy with Downing but not Duncan. Mr. Butcher stated that he agreed to pay a lump sum of $315,000 to discharge Duncan's indebtedness over a period of two years because he wanted to insure that he maintained a certain degree of control over Duncan to perform what Duncan had agreed to do: work at Knox Federal Savings and Loan--a mutual savings and loan in Knoxville, Tennessee, over which Butcher desired to obtain control and convert to a stock institution for integration into Butcher's banking system.

assessment and collection of income taxes in violation of 18 U.S.C. § 371.

This broad conspiracy count included both as overt acts and as means by which the conspiracy was carried out the substantive offenses involving the 1981 and 1982 returns as set forth in Counts 2 through 5 of the indictment.

Count 2 charged Duncan with violating 26 U.S.C. § 7206(1) by filing an income tax return for 1981 which he knew to contain false and material statements. Count 4 of the indictment charged Downing with violating 26 U.S.C. § 7206(2) by aiding Duncan in preparation of this tax return.

Counts 2 and 4 of the indictment made clear that it was the government's position that characterizing the $200,000 transaction in 1981 as short-term capital gain instead of ordinary income constituted a false and fraudulent statement on Duncan's 1981 return.

Count 3 of the indictment charged Duncan with violating 26 U.S.C. § 7206(1) by filing a tax return in 1982 which he knew to contain false and material statements. Count 5 of the indictment charged Downing with violating 26 U.S.C. § 7206(2) by aiding Duncan in the preparation of this return.

Similarly, counts 3 and 5 of the indictment, which are at issue before this Court, clearly recited that the $115,000 transaction, reported as short-term capital gain in 1982 rather than ordinary income, was a false and fraudulent statement on Duncan's 1982 return.

Count 2 of the indictment also included an allegation that Duncan's income tax return from 1981 was false because it did not include approximately $11,000 in salary received from J.C. Bradford and Company. Count 4 of the indictment against Downing did not include this $11,000 salary item as an alleged false statement.

Further, counts 3 and 5 of the indictment contained an allegation that Downing's 1982 tax return was false and fraudulent because it represented that Duncan was entitled to an interest expense deduction of approximately $8,800 when Duncan had not paid this amount of interest or taken that payment into his income.

In May of 1987, the petitioners were tried on the indictment. Throughout the entire trial, the prosecution's evidence consistently linked the two short-term capital gain transactions set out in Duncan's 1981 and 1982 tax returns as part of the same alleged scheme to defraud the government. See *United States v. Duncan*, 850 F.2d 1104, 1107 n. 2.

Both Butcher's testimony and the supporting documentary evidence introduced by the government established that the discharge of Duncan's indebtedness was to be accomplished over a two-year period, but that there was one transaction giving rise to the two installment discharge: the single option to buy a motel. This conclusion was also supported by the working papers of Downing's own company, DESH, showing that this company carried the option on the Howard Johnson's Motel as a single asset of the corporation valued at a total amount of $315,704.28.

Finally, both government and defense tax experts treated the $200,000 transaction and the $115,000 transaction as related for tax-reporting purposes.

In closing argument, the prosecution vigorously argued that the $200,000 and $115,000 transactions were related parts of the same overall scheme to defraud the government by falsely reporting these transactions as short-term capital gain on Duncan's 1981 and 1982 tax returns.

Yet, the jury's verdict soundly repudiated the core of the prosecution's case, concluding, despite Butcher's plea and testimony, that there was no conspiracy to defraud the IRS by means of the 1981 and 1982 tax returns, and further finding that the characterization of the $200,000 transaction as capital gain did not constitute a false statement. The jury acquitted the petitioners on all counts except counts 3 and 5, which related to Duncan's 1982 tax return.

Petitioners appealed their convictions to the United States Court of Appeals for the Sixth Circuit where they were reversed on the grounds that the trial court did not adequately instruct the jury that they must unanimously agree that either: (1) both statements alleged to be false in the 1982 return were in fact false; or (2) one of the statements was false and all jurors agreed specifically on which statement was false. *United States v. Duncan*, 850 F.2d 1154, 1115 (6th Cir. 1988).

Petitioners' convictions were vacated, and the case was remanded to the United States District Court for the Eastern

District of Tennessee for further proceedings.

Prior to retrial on counts 3 and 5 of the indictment, Downing filed a motion to dismiss counts 3 and 5 on the grounds that reprosecution of these counts was barred by the collateral estoppel component of the double jeopardy clause of the United States Constitution. Duncan joined.

Relying on *Ashe v. Swenson*, 397 U.S. 436 (1970) and *Sealfon v. United States*, 332 U.S. 575 (1948), petitioners contended that because the jury acquitted on both the conspiracy and 1981 substantive count involving the $200,000 transaction, the prosecution was collaterally estopped from asserting that the 1982 return, which reported the $115,000 transaction, contained a false and fraudulent statement.

The district court denied petitioners' motions to dismiss because it rejected the preclusive effect of the jury's acquittals on counts 2 and 4 concerning the 1981 tax return because it concluded that a rational jury could have grounded its verdict on the theory that Duncan's 1981 tax return was improperly filed and therefore not a "return." App. at 25a. The court also dismissed the preclusive effect of the acquittal on the conspiracy count, finding *Sealfon v. United States*, 332 U.S. 575 (1948) inapplicable, because, it concluded that the jury's conspiracy acquittal did not determine a fact essential to the petitioners' reprosecution on counts 3 and 5 of the indictment and *Sealfon* was distinguishable because it involved separate trials on single-count indictments. See App. 20a - 21a.

However, the district court ordered the continuance of the trial to permit the petitioners to interlocutorily appeal its decision denying their motion to preclude reprosecution under *Abney v. United States*, 431 U.S. 651 (1977) and *Richardson v. United States*, 468 U.S. 317, 322 (1984). See App. at 26a - 27a, 28a.

The petitioners appealed to the Sixth Circuit. The Sixth Circuit affirmed, holding that there was no inconsistency between the petitioners' conspiracy acquittal and acquittal based upon the 1981 return and a conviction based upon the 1982 return. The Sixth Circuit concluded that although it seemed "unlikely," the jury could have accepted the theory that the document on which the government's 1981 return false statement case was based was not Duncan's 1981 tax return. See App. at 8a. The court alternatively concluded that the jury could have based its verdicts of acquittal on its finding that the right of first refusal was worth only $200,000 or that the agreement between the parties was for no more than this amount; thus, based upon this conclusion, the jury could find that the characterization of that 1981 transaction as capital gain was appropriate but that the 1982 statement seeking to assign additional value of $115,000 to that option was fraudulent. See App. at 8a - 9a.

A petition to rehear was denied by the Sixth Circuit on October 2, 1989. See App. at 10a - 11a.

On October 19, 1989, the Court of Appeals, upon petitioners' motion, stayed its mandate until December 1, 1989, in order to permit the petitioners to file the

instant petition for a writ of certiorari in this Court. See App. 12a - 13a.

REASONS FOR GRANTING THE WRIT

I. THE PRINCIPLES OF CONSTITUTIONAL COLLATERAL ESTOPPEL ARTICULATED IN *ASHE V. SWENSON*, 396 U.S. 436 (1970) PRECLUDE THE REPROSECUTION OF THE PETITIONERS FOR TAX FRAUD CHARGES FOR BOTH OF TWO ALLEGED MISREPRESENTATIONS IN PETITIONER DUNCAN'S 1982 TAX RETURN WHEN THE JURY'S VERDICT CLEARLY CONSTITUTED A REPUDIATION OF THE GOVERNMENT'S THEORY THAT ONE OF THE TWO ALLEGED FALSE STATEMENTS WAS A CRIMINAL VIOLATION.

In *Ashe v. Swenson*, 396 U.S. 436 (1970), a poker game with six participants was robbed by three or four individuals. The perpetrators of the robbery took money and various articles of personal property from each of the participants and fled the house in a car belonging to one of the poker players. The petitioner, Bob Fred Ashe, was charged with seven separate offenses: The armed robbery of each of the six poker players and the theft of the car. 397 U.S. at 438. Ashe was tried first on the single charge of robbing Donald Knight. Ashe was acquitted. The prosecution later tried Ashe, over objection, for the armed robbery of another poker player. This time, with the same witnesses but better testimony Ashe was convicted. *Id.* at 440.

The United States Supreme Court vacated Ashe's conviction upon a writ of habeas corpus because it concluded that the prohibition against double jeopardy in the Fifth Amendment to the United States

Constitution precluded the State from relitigating the same armed robbery in Ashe's second trial for which he had been acquitted by a previous jury. 397 U.S. at 445-447.

In this case, the government seeks to reprosecute Mr. Duncan and Mr. Downing for the "armed robbery" for which the jury acquitted them in their first trial; rather than the subsidiary "car theft" or $8,800 alleged false statement that is included in counts 3 and 5 of the indictment against them as a collateral offense to the main case. For the following reasons, this effort is constitutionally barred.

The alleged armed robbery in this case consists of the government's theory, as demonstrated by the allegations in the indictment and the proof at trial, that the transaction involving Downing's receipt of the Howard Johnson's option, its transfer to Duncan, the loans to Downing's company (DESH) by UAB, and the discharge of Duncan's approximately $315,000 in indebtedness to UAB was a "phony scheme designed to disguise as a capital gain what was really a flat fee paid by Butcher to Duncan.. . ." *United States v. Duncan*, 850 F.2d 1104, 1108 (6th Cir. 1988).

As in *Ashe*, the government also charged the petitioners with a "car theft," a tangential off-shoot of the thrust of the main "armed robbery" prosecution. The "car theft" alleged involves the $8,800 in interest expense on Duncan's UAB loans claimed as a deduction on Duncan's 1982 tax return.

The government's proof as to this allegation showed that in the spring of 1982, Downing wrote a check on a DESH account paying UAB $8,817.56 on Duncan's loans at the institution. Duncan's 1982 tax return claimed this amount as an interest expense deduction. Counts 3 and 5 of the indictment alleged that this claimed deduction constituted a knowingly false statement on Duncan's 1982 tax return.

The jury's verdict acquitting the petitioners of the *Klein* conspiracy in the 1981 count charging that the first installment of Butcher's payment to Duncan ($200,000) was improperly reported as a capital gain constitutes the rejection of the government's "sham transaction" theory of tax fraud.

The 1982 installment of $115,000 and its tax consequences was inextricably linked to the $200,000 1981 installment by the government's proof and argument and the defense proof and argument. Neither of the parties at trial ever attempted to separate these two installments.

C.H. Butcher testified for the prosecution that he agreed to pay a *total* fee of $315,000 to discharge Duncan's indebtedness over a period of two years in return for Duncan's cooperation in taking over the management of Knox Federal. Mr. Butcher's testimony was confirmed in a letter to Joe Duncan as well as the draft agreement prepared to consummate the transaction. The government's documentary proof further established that the first installment of $200,000 in 1981 discharged all of Duncan's liability on a June 30, 1981, note to UAB but only a portion of his

liability on a note dated April 25, 1982. Hence, the second payment in 1982 was necessary to complete the work of the first in 1981.

Moreover, none of the expert witnesses who testified for the government and defense treated the $200,000 transaction differently from the $115,000 transaction for tax reporting purposes. Significantly, the prosecution's summary expert witness conceded that if the underlying option for the Howard Johnson's Motel had value, the gain or transfer of that item was properly reported to short-term gain. Hence, the two transactions were joined for tax purposes, whichever characterization was adopted.

Thus, contrary to the Court of Appeals contention, a rational jury would have had no basis upon which to conclude that "the value of the right of first refusal was not more than $200,000 or that the agreement was for no more than this amount." See App. at 8a.

Petitioner Duncan's asserted defense that the 1981 document upon which the government was relying as his return did not constitute a return because he failed to sign it similarly does not constitute a rational basis upon which the jury could have grounded its verdict. As the *Ashe* court made clear, collateral estoppel is "not to be applied with the hypertechnical and arcaic approach of a 19th century pleading book, but with *realism and rationality*." *Id.* at 444 (emphasis supplied). Accordingly, courts are not constrained to find "hypertechnical and unrealistic grounds upon which the jury could conceivably have rested its

conclusions." *United States v. Mespoulede*, 597 F.2d 329, 333 (2d Cir. 1979) (quoting *United States v. Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977)).

The so-called "no return" defense, which counsel for defendant Downing never joined, was thoroughly rebutted by the government's proof that Mr. Duncan signed a subsequent document verifying his federal income tax return for the year ended December 31, 1981, as well as other evidence. The Court of Appeals conclusion that it was "unlikely" for the jury to have accepted this position is enough, when *Ashe's* mandate of a realistic examination of the record is applied, to remove this as a viable basis for the jury's verdict.

Only an impermissible, hypertechnical, and unrealistic reading of the record could result in any other conclusion but that the "single, rational, conceivable issue in dispute" was whether the $200,000 and $115,000 installments of the same overall transaction were falsely reported on Duncan's 1981 and 1982 tax returns. *Ashe*, 397 U.S. at 445. Thus, the $115,000 transaction was part and parcel of the government's "sham transaction" theory--analogous to the armed robbery charge in *Ashe*. Accordingly, the jury's verdict represents an equal rejection of the government's theory that the reporting of this single transaction--spread over two years--was false and fraudulent.

Yet, the government now seeks to reprosecute the same armed robbery rather than the subsidiary car theft. That is to say, it seeks to prosecute both alleged

false statements on the 1982 return: (1) the $115,000 transaction which cannot be pursued without relitigating the overall "armed robbery" it lost at the first trial; and (2) the $8,800 "car theft" charge, which is unrelated to the sham transaction theory rejected by the jury.

Ashe stands for the proposition that the armed robbery case cannot be relitigated; but it does not preclude prosecution at the tangential car theft charge. Similarly, under *Ashe*, the government is estopped from relitigating the $115,000 transaction which is tied to the government's main case of tax fraud.

The instant case presents the question of the correct application of the principles of collateral estoppel to a complex factual situation. Yet, when reduced to its core, the case presents as clear violation of the petitioners' Fifth Amendment guarantees as did the State's prosecution of the petitioner in *Ashe v. Swenson*, 396 U.S. 436 (1970). Accordingly, this Court should grant the instant petition for writ of certiorari.

II. THE PRINCIPLES OF COLLATERAL ESTOPPEL ARTICULATED IN *SEALFON V. UNITED STATES*, 332 U.S. 575 (1947), BAR THE PETITIONERS' RETRIAL FOR SUBSTANTIVE COUNTS OF TAX FRAUD WHEN THE JURY'S VERDICT OF ACQUITTAL ON A CHARGE OF CONSPIRACY TO DEFRAUD THE UNITED STATES REPRESENTS A REJECTION OF THE CORE OF THE GOVERNMENT'S CASE UPON WHICH THE SUBSTANTIVE COUNTS ARE BASED.

In *Sealfon v. United States*, 332 U.S. 575 (1947), this court held that because the jury's acquittal of the petitioner for conspiracy to defraud the United States Government determined a fact essential to subsequent prosecution for the substantive offense of aiding and abetting his alleged co-conspirator and publishing false invoices to a government-rationing board, his trial and conviction on the substantive offense was precluded by the principles of res adjudicata. *Id.* at 578-580.

Sealfon, like petitioners Duncan and Downing, was charged and acquitted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 by presenting false invoices and making false representations to a ration board to the effect that certain sales of sugar products were made to exempt agencies. *Id.* at 576.

Sealfon was then tried on another indictment charging him with aiding and abetting Greenberg in submitting false invoices which were introduced as overt acts in Sealfon's conspiracy trial. The same evidence was introduced against Sealfon at this second trial; but, this time he was convicted. *Id.* at 578.

This court rejected the government's argument that all the prior verdict established was that Sealfon was not a member of an overall conspiracy to defraud the government and thus it was not foreclosed from showing in the second trial that Sealfon had written a specific letter pursuant to an agreement with Greenberg to defraud the United States. *Id.* at 578.

The court viewed the case in a "practical frame and . . . with an eye to all the circumstances of the proceedings" *Id.* at 579. Because there was no evidence connecting Sealfon with anyone other than Greenberg and because an agreement with Greenberg was a requisite for conviction on the conspiracy count, the court found that the verdict of acquittal on the conspiracy charge determined that Sealfon who, without doubt, wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud the government. *Id.* at 580.

Accordingly, because Sealfon could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg and under the evidence introduced he could have aided and abetted Greenberg in no other way, the core of the prosecutor's case in each case was the same, and his prosecution for aiding and abetting Greenberg was barred. *Id.* at 580.

In the instant case, neither the district court nor the court of appeals chose to confront the holding of *Sealfon* in detail.

The district court rejected its applicability in the instant case for essentially two reasons.

First, the district court distinguished *Sealfon* on the basis that it involved two, single-count indictments, and the instant case involves a single, multi-count indictment. Therefore, the district court rejected *Sealfon's* applicability solely on the general principle that collateral estoppel does not prohibit conviction on some counts of an indictment and acquittal on others, citing *Dunn v. United States*, 284 U.S. 390 (1932). See App. at 20a - 21a, at n. 3.

The government relied upon this position on appeal. However, the Sixth Circuit did not address this contention.

Second, the court concluded that the finding of an "agreement" between the petitioners was not a necessary element required to be proved by the government in order to convict them on the substantive offenses charged in counts 3 and 5, and therefore the court rejected any preclusive effect of the conspiracy acquittal. See App. at 21a.

The distinction that *Sealfon* involved two trials on single-count indictments and the instant case involves a verdict in a single, multi-count indictment is one without a difference.

In *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979), the Second Circuit soundly rejected any contention that collateral estoppel is inapplicable to the retrial of charges contained in a multi-count indictment. *Id.* at 336-337. The *Mespoulede* court rejected the contention that application of collateral estoppel in a multi-count indictment context is

inconsistent with the undisputed rule that acquittal on one count of an indictment does not preclude the same jury from relying on the same evidence for proof of other counts, and thus verdicts on different counts of the same indictment, returned by one jury at the same time, are valid even if the results are inconsistent. *Id.* at 336 (citing *Dunn v. United States*, 284 U.S. 390 (1932)). The court stated:

> But it hardly follows from the fact that a single jury in one trial is allowed to render inconsistent verdicts that a *second* jury in a *second* trial should be permitted to rely on the evidence rejected by the first.

Id. (emphasis in original).

The court reasoned that inconsistencies in jury verdicts were tolerated out of deference to the nature of the jury and its role in ours jurisprudence. But, it concluded that internal inconsistency in a verdict is not an end in and of itself and it would be irrational to expand "gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results." *Id.* at 337.

Allowing a second jury to reconsider the precise issues upon which the defendant has prevailed does not serve a valuable function but implicates concerns about the "injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." *Id.* (citing *Green v.*

United States, 355 U.S. 184, 187-88 (1957)). *See also, United States v. Frazier*, 800 F.2d 878 (6th Cir. 1989) (applying collateral estoppel in a multi-count indictment context); *United States v. Larkin*, 605 F.2d 1360, 1370 n. 26 (5th Cir. 1979) (holding that collateral estoppel may be applied to one count of a multi-count indictment).

Thus, the principles of collateral estoppel are equally applicable to this case involving a multi-count indictment.

When the principles of collateral estoppel set forth in *Sealfon* are applied to the facts of this case, it is clear that the petitioners' retrial on the $115,000 transaction set forth in counts 3 and 5 of the indictment is precluded.

In this case, the jury was instructed that in order to convict the petitioners of conspiracy to defraud the government, they must find not only an agreement to defraud the government but an overt act committed by a conspirator in furtherance of that agreement.

Critically, C.H. Butcher, Jr., who was also indicted for the conspiracy alleged in Count 1, testified at trial that he plead guilty to that count and admitted to participating in a conspiracy with Downing, but not Duncan, in handling the transactions involved in this case. Hence, Butcher, like Greenberg in *Sealfon*, testified that he and Downing were members of the same conspiracy. Thus, in light of this devastating testimony, which established the conspiracy between Downing and Butcher, the jury's acquittal of Downing and Duncan on a conspiracy count must be considered as more

than simply a finding that no agreement existed within the meaning of count 1.

Count 1 of the indictment, when reduced to its essence, alleged that two specific overt acts were committed in furtherance of the conspiracy: (1) the filing of a false and fraudulent tax return by Duncan with Downing's assistance in 1981; and (2) the filing of a false and fraudulent tax return by Duncan in 1982, also assisted by Downing.

Thus, the jury's rejection of the conspiracy count was a rejection not of an agreement to defraud the government, but the core of the prosecution's case: that the $315,000 transaction resulted in the filing of false and fraudulent income tax returns for 1981 and 1982.

As in *Sealfon*, the core of both the conspiracy count and the remaining substantive count is the same: that there was an underlying scheme to defraud the government by characterizing two items arising from the same transaction as short-term capital gain which resulted in the filing of false tax returns for 1981 and 1982.

In rejecting the conspiracy count, the jury necessarily rejected the core of the government's case, and under *Sealfon*, the prosecution is now precluded from attempting to relitigate that core case--the $115,000 transaction--against petitioners Duncan and Downing in counts 3 and 5 of the indictment.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOE S. DUNCAN and
MICHAEL M. DOWNING,

Defendants-Appellants.

Nos. 88-6365, 88-6366

United States Court of Appeals,
Sixth Circuit

August 7, 1989

Appeal from the United States District Court for the Eastern District of Tennessee.

Before MERRITT and KENNEDY, Circuit Judges; and WALINSKI, Senior District Judge[1]

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[1] The Honorable Nicholas J. Walinski, Senior Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

MERRITT, Circuit Judge:

Defendants Duncan and Downing appeal on double jeopardy grounds an order of the District Court denying their motion to dismiss criminal tax charges for making false statements on their tax returns. Specifically, defendants contend that a retrial and conviction on Counts 3 and 5 of their indictment would be inconsistent with their previous acquittal on Counts 1, 2, and 4 of the indictment and would, therefore, violate the Double Jeopardy Clause. We disagree, and shall affirm the order of the District Court.

The relevant facts are presented in detail in this Court's decision reversing Downing's and Duncan's convictions at the first trial. For a full understanding of the case, one must read our lengthy opinion in *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988). The facts are briefly summarized as follows:

> The indictment charged [C.H.] Butcher, Duncan, and Downing with conspiring to defraud the United States by impeding the ascertainment and collection of income taxes in violation of 18 U.S.C. 371 (Count One); charged Duncan with violating 26 U.S.C. 7206(1) by making false returns for the years 1981 (Count Two) and 1982 (Count Three); and charged Downing with violating 26 U.S.C. 7206(2) by aiding in the preparation of false returns for the years 1981 (Count Four) and 1982 (Count Five) ...

> [T]he Government's theory, described a scheme whereby Butcher sought to gain control of the Knox Federal Savings & Loan, a mutual S & L over which Duncan's family exercised partial control. In return for the assistance of the Duncans ... Butcher agreed to undertake separate financial transactions favorable to ... [the] family ... Defendant Duncan ... had about $310,000 in indebtedness to the United American Bank (UAB) of Knoxville, which Butcher's family controlled ... Butcher testified that to enlist the Duncan's support, he and Crabtree, [Butcher's close associate,] with Downing as a middleman, devised an arrangement to write off defendant Duncan's debt.

850 F.2d at 1106 (footnotes omitted). This arrangement was structured in the following manner:

> Downing persuaded the owner of a Knoxville motel to convey, for nominal consideration, the right of first refusal to buy an interest in a Memphis (sic) motel to Duncan. Duncan then assigned the right to Downing for a stated consideration of

$200,000.[2] The documents used to convey these interests were allegedly backdated.

Downing paid Duncan $200,000 in 1981. The $200,000 came from a loan which Butcher's bank made to Desh, a dummy corporation controlled by Downing. Duncan used this money to apply to his indebtedness at Butcher's bank and claimed a short term capital gain of the $200,000 on his 1981 tax return.

Butcher's bank later made a second loan to Desh of $115,704.28. This money was used to pay off the remainder of Duncan's indebtedness to Butcher's bank. Duncan claimed this sum as a short term capital gain on his 1982 return. Duncan also claimed $8,817.59 paid on his behalf by Desh as an interest expense deduction.

Neither loan to Desh was ever repaid. The loans, totaling about $315,000 were eventually written off by a bank that assumed them after Butcher's bank failed.

Duncan, Downing and Butcher were indicted as described above. Butcher pled guilty and testified for the government. The jury acquitted Duncan and Downing on Counts 1, 2 and 4 and convicted on Counts 3 and 5, involving the 1982 tax year.

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[2] There are other contemporaneous documents which indicate that the consideration contemplated by the parties was $310,000. Defendants contend that the consideration was $310,000 and that the sum was paid in installments in 1981 and 1982 and so reported on Duncan's tax return.

On appeal, this Court, reversed the convictions on Counts 3 and 5. *See Duncan*, 850 F.2d 1104. The Court held that the District Court should have given the jury an augmented instruction that the jurors must agree on the willful falsity of at least one, and the same one, false statement. This Court, therefore, vacated the convictions and remanded the case for a new trial on Counts 3 and 5.

On remand before the District Court, Duncan and Downing contended that a second trial on Counts 3 and 5 was barred on double jeopardy grounds. Specifically, Duncan and Downing argued that because the government treated the $315,000 debt discharge transaction as a single scheme for purposes of the conspiracy count and the jury acquitted them on the conspiracy count and the counts involving the 1981 tax return, the government is collaterally estopped from retrying them on Counts 3 and 5 -- the substantive charges arising from the 1982 return.

The District Court rejected this argument. The Court relying on *Sealfon v. United States*, 332 U.S. 575 (1948), held that in order to prevail on double jeopardy based on their conspiracy acquittal, defendants must show that the jury decided for the defendants an ultimate fact which constitutes an element of the substantive offense for which they are now on trial. The defendants cannot meet that requirement here, the District Court continued, because the conspiracy acquittal may have been based on the fact that there was no agreement.

Nor, the court continued, does defendants' acquittal on the fraud charges

arising from the 1981 tax return bar reprosecution on the charges arising from the 1982 return. The court rejected defendants' theory that the acquittal was based on the jury's finding that the declaration of short-term capital gain on the 1981 return was not false and fraudulent. Instead, the court concluded, the acquittal could be based on Duncan's defense theory that he had not signed a 1981 return meaning there was no statement filed at all, let alone a false one. Moreover, the court said, the evidence concerning the $200,000 option on the 1981 return was "qualitatively" different from that concerning the $115,000 and $8,000 entries on the 1982 return. Thus, the jury could have believed that the 1981 entry was genuine and the 1982 entries not.

In addition, the Court referred to its 1987 decisions holding that the jury's verdicts of conviction of Counts 3 and 5 were both factually and legally supportable despite its verdict of acquittal on the remaining counts. Defendants' double jeopardy argument, the Court concluded, is merely a rehash of this earlier "inconsistent verdict" argument.

Finally, the Court relying on *Richardson v. United States*, 468 U.S. 317 (1984), ruled its order immediately appealable under 28 U.S.C. 1291.

The doctrine of collateral estoppel as it relates to double jeopardy provides that once an issue of ultimate fact has been determined, that issue cannot again be litigated. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In criminal cases, the rule of collateral estoppel should not be applied

with "the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality ... The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* at 444, quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1984). The burden on defendants is to show that the verdict *necessarily* decided the issues that they claim the Government is attempting to relitigate. *See United States v. Benton*, 852 F.2d 14356 (6th Cir.), *cert. denied*, 109 S.Ct. 555 (1986), and *United States v. Johnson*, 697 F.2d 735, 741 (6th Cir. 1983).

Defendants argue that the court below erred by engaging in an "unrealistic and hypertechnical analysis" of the possible basis for the jury's verdict. They argue that the acquittal on the conspiracy charge was a determination that the 1981 *and the 1982* tax returns did not contain any false statements. They similarly assert that their acquittal on Counts 2 and 4, relating to the 1981 tax returns, was a determination that there were no false statements in the 1982 returns. These assertions are based on defendants' characterization of the Government's theory as alleging wrongdoing as a part of a single scheme or transaction.

Defendants' position is overstated. Giving a reasonable interpretation to the jury's verdicts, defendants' conviction on the basis of the 1982 return would not necessarily be inconsistent with their acquittal on the conspiracy and 1981 charges for several reasons.

First, there is no inconsistency between the conspiracy acquittal and a

conviction based on the 1982 return. The jury could have decided that there was no "agreement" between Butcher, Duncan and Downing. Or the jury could have decided that even though there was an agreement to engage in the sham transaction, there was no agreement to commit the *particular* substantive offense -- the making of a fraudulent statement on the 1982 tax return. They could have believed the value of the right of first refusal was not more than $200,000 or that the agreement was for no more than this amount. It is apparent, therefore, that the acquittal did not necessarily determine that the 1982 tax return did not contain false and fraudulent statements.

Second, there is no inconsistency between the acquittal based on the 1981 return and a conviction based on the 1982 return. Although it seems unlikely, the jury could have accepted the defense theory that the document on which he Government's 1981 return false statement case was based was not Duncan's 1981 tax return.

Moreover, the jury could have found that the right of first refusal was worth only $200,000, as stated on the face of the September 21, 1981 document assigning the right from Duncan to Downing. *See* Government Exhibit 5. Relying on such a finding a jury could conclude that the 1981 statement was honest, or at least not so dishonest as to make defendants criminally liable, but that the 1982 statement seeking

to assign an additional value of $115,000 to the right was fraudulent.[3]

Much of the evidence consisted of expert opinion as to the value of the right of first refusal and live testimony as to oral rather than written agreements between the parties. Given the contentious and uncertain nature of such evidence, we cannot say that this case should be withdrawn from the jury on the grounds that acquittal on Counts 1, 2 and 4 bar retrial on Counts 3 and 5.

The decision of the District Court is affirmed.

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[3] Defendants point to our earlier opinion, 850 F.2d at 1107 n. 2 as finding that the full consideration for the right of first refusal was $310,000. This is also an overstatement. We merely stated that there were documents which support the contention that the full consideration for the right was $310,000. We did not, however, hold that the jury so found nor that the case should be withdrawn from the jury on this ground.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOE S. DUNCAN and
MICHAEL M. DOWNING,

Defendants-Appellants

Nos. 88-6365/6366

United States Court of Appeals,
Sixth Circuit

October 2, 1989

Appeal from the United States District Court for the Eastern District of Tennessee.

ORDER DENYING PETITION FOR REHEARING

Before: JUDGES MERRITT and KENNEDY, Circuit Judges; and WALINSKI, Senior District Judge[1]

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[1] The Honorable Nicholas J. Walinski, Senior Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

The Court has carefully considered the petition to rehear filed on behalf of defendants, Duncan and Downing, and concludes that the petition for rehearing should be and it is hereby denied. The Court has in fact reviewed the record in the case, contrary to the unsupported allegations to the contrary found in the petition to rehear. The Court declines to rule on the evidentiary questions which will be presented at the retrial in the case. Such evidentiary questions have not been tried by the trial court. This Court is a court of appeal, that is, a court of review. Having nothing on these questions to review at this point in the case, the Court declines to decide the questions. They remain hypothetical and unframed in the District Court at this point in time.

Accordingly, it is ORDERED that the petition to rehear be denied.

ENTERED BY ORDER OF THE COURT

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Leonard Green

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOE S. DUNCAN and
MICHAEL M. DOWNING,

Defendants-Appellants

Nos. 88-6365

United States Court of Appeals,
Sixth Circuit

October 19, 1989

Appeal from the United States District Court for the Eastern District of Tennessee.

ORDER

BEFORE: MERRITT, Chief Circuit Judge, KENNEDY, Circuit Judge, WALINSKI, District Judge[1]

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[1] The Honorable Nicholas J. Walinski, District Judge for the Northern District of Ohio, sitting by designation.

Upon consideration of the appellant's motion to stay the mandate,

It is ORDERED that the motion be and it hereby is GRANTED and the mandate shall stay until December 1, 1989.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CR-3-86-54
	)	
	)	FILED:
JOE S. DUNCAN and	)	11/14/89
MICHAEL M. DOWNING	)	

M E M O R A N D U M

The Court will address defendant Duncan's motion for severance (Court File No. 268) and the defendants' motions to dismiss Counts 3 and 5 on double jeopardy grounds (Court File Nos. 272 and 283).

Motion for Severance
(Court File No. 268)

Defendant Duncan has moved (Court File No. 268) this Court for a severance asserting that such a severance is necessary to allow him to call codefendant Michael M. Downing as a witness to bolster defendant Duncan's "good faith reliance upon tax accountant" defense. Counsel for defendant Downing has assured the Court that Mr. Downing will testify and waive his Fifth Amendment privilege if called to testify at a separate trial for Duncan, but that he would exercise his Fifth Amendment privilege, and not testify, at a joint trial.

Where defendant claims prejudice from the loss of codefendant testimony and, therefore, seeks a severance, there are a number of factors to be weighed by the Court. These have recently been conveniently summarized by the Eleventh Circuit Court of Appeals in *United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084 (1986), in the following manner:

> If a defendant claims that he was prejudiced by the loss of co-defendant testimony which might have been forthcoming at a separate trial, he must demonstrate: (1) a bona fide need for the testimony (2) the substance of the testimony (3) its exculpatory nature and effect and (4) that a co-defendant would, in fact, testify if the cases were severed. If such a showing is made, the trial court must: (1) examine the significance of the testimony in relation to the defendant's theory of defense (2) assess the extent of prejudice caused by the absence of the testimony (3) pay close attention to judicial administration and economy (4) give weight to the timeliness of the motion.

763 F.2d at 1263.

In weighing these factors, the Court determines that a severance is warranted in this case. Defendant Duncan has made a "prima facie" showing of prejudice by satisfying the first four of the above elements. The testimony of Mr. Downing apparently would relate to defendant

Duncan's "good faith" theory of defense. The Court agrees with defendant Duncan that this testimony could be significant since Downing was in fact the accountant upon whom defendant Duncan allegedly relied.[1]

The granting of this motion will not aid the cause of judicial economy since it may mean that this Court will ultimately have to try this case three times. However, on balance, this Court concludes upon consideration of all of the above factors that defendant Duncan's motion should be GRANTED as an exception to the general rule favoring a joint trial for persons jointly indicted.

The trial of defendant Duncan on Count 3 of the indictment shall commence in the United States District Court for the Eastern District of Tennessee, Southern Division, in Chattanooga, at a date to be determined after any appeal of the double jeopardy issue raised by the defendants is resolved (*see* page 14 below). The trial of defendant Downing on Count 5 of the indictment shall commence immediately after the conclusion of defendant Duncan's trial.

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[1] The Court cannot help but observe that defendant Duncan's position is slightly inconsistent with that taken by him on the original appeal of this case when he succeeded in convincing the Court of Appeals for the Sixth Circuit that even without Downing's testimony, he introduced enough evidence to warrant a specially tailored jury instruction on the "good faith" defense. *United States v. Duncan*, 850 F.2d 1104, 1118 (6th Cir. 1988).

A separate order will enter in accordance with this memorandum.

Defendant's Motions to Dismiss
Counts 3 and 5 on Double Jeopardy Grounds
(Court File Nos. 272 and 283)

Defendants seek dismissal of the remaining counts of the indictment, Counts 3 and 5, based on the argument that their retrial after appeal and reversal of their previous convictions on those counts would violate the double jeopardy prohibition contained in the Fifth Amendment.[2] "It is well settled that the Double Jeopardy Clause protects defendants 'in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.'" *United States v. Miller*, 797 F.2d 336 (6th Cir. 1986), *quoting United States v. Dinitz*, 424 U.S. 600, 606 (1976).

Defendants argue that because the Government sought to treat the $315,000 debt discharge transaction between defendant Duncan and C. H. Butcher, Jr. as a single

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[2] Initially, defendant Downing alone filed this motion to dismiss (Court File No. 272), explaining that, although he was only named in Count 5 but not Count 3 of the indictment, "inclusiveness" and the commonality of the issue raised to both counts justifies Downing in arguing for dismissal of Count 3 as well. Apparently, this generosity was not lost on defendant Duncan or his counsel, as he has now joined in Downing's motion to dismiss (Court File No. 283).

scheme for purposes of the conspiracy count of the indictment, the jury's acquittal of the defendants on that count, as well as the defendants' acquittal on tax fraud charges arising from Duncan's 1981 tax return, result in the Government being estopped from retrying the defendants on the substantive charges arising from the 1982 return. It is the defendants' claim that since the allegedly false and fraudulent entries contained on Duncan's 1982 tax return (Counts 3 and 5) represent proceeds from the same, single debt discharge transaction, merely spread over two tax years, the jury's acquittal of them on the conspiracy and 1981 tax return counts prevents the Government from again attempting to prove the single transaction was fraudulent. The Government has responded in opposition (Court File Nos. 290 and 292).

Specifically, the defendants rely on the theory of collateral estoppel, which requires "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This procedural rule applies not only in civil cases, but also in criminal proceedings. *See United States v. Oppenheimer*, 242 U.S. 85 (1916). For purposes of double jeopardy analysis, the test to determine whether collateral estoppel will bar the defendants' subsequent criminal prosecution under these facts was set out as follows by the *Ashe* court:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, *this approach requires a court to*

> 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and *conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.*'

397 U.S. at 444 (emphasis added).

The defendants argue that their acquittal on the conspiracy charge was a determination by the jury of "an issue of ultimate fact" that there was no "agreement" between these defendants to defraud the Internal Revenue Service, the gist of the conspiracy offense. Additionally, defendants argue that the jury's decision to acquit them of the substantive 1981 tax fraud charges in counts two and four of the indictment should be considered as a determination of ultimate fact that Duncan's debt discharge transaction with Butcher was not fraudulent, and the defendants' characterization of it as short-term capital gain for tax purposes in 1981 did not constitute a criminal violation. The defendants assert that since the Government's theory of the case was that the substantive tax fraud counts were closely related to and arising from the criminal scheme charged in the conspiracy count, their acquittal on the conspiracy and 1981 tax fraud counts logically prevents a different result as to the 1982 substantive tax fraud counts. Under the defendants' argument such a reading of the jury's acquittal of these defendants in the first trial renders their retrial on the substantive tax fraud charges arising from

the 1982 tax return an unconstitutional violation of double jeopardy, assuming the jury also considered the tax treatment of the debt discharge transaction to be a single event merely spread over two tax years.

With regard to the defendants' argument as to the preclusive effect of the acquittal on the conspiracy count, it is clearly established in the law that prosecution for the commission of the substantive offense in addition to prosecution for conspiracy to commit the same offense is not prohibited by the rules of double jeopardy because they are "separate and distinct offenses." *See Sealfon v. United States*, 332 U.S. 575, 578 (1948); *Pinkerton v. United States*, 328 U.S. 640 (1946). As stated by the *Sealfon* court, and cited by the defendants, "the only question . . . is whether the jury's verdict in the conspiracy trial was a determination favorable to [the defendants] of the facts essential to conviction of the substantive offense." *Sealfon*, 332 U.S. at 578-79.[3] In

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[3] As pointed out by the Government, *Sealfon* is factually and procedurally distinguishable from the present case. In *Sealfon*, the defendant was tried on two separate indictments, one of which charged only a conspiracy in the single count indictment. Subsequently, there was a second trial on the substantive counts after the previous acquittal on the conspiracy count. Based on the specific facts of that case, the Supreme Court reversed the second conviction on double jeopardy grounds, holding: "the verdict of the jury on the conspiracy trial was a determination

order for defendants to succeed based on their argument relating to the conspiracy acquittal, the jury must have determined an essential fact by its acquittal, and that fact must also necessarily be determinative for a conviction of the substantive offenses. As the Court's jury charge in the prior trial reveals, "agreement" between these individuals is not a necessary element required to be proved by the Government beyond a reasonable doubt in order to convict on the substantive offenses charged in Counts 3 and 5 of the indictment. *See* Charge to the Jury, CR-3-86-54, pp. 21-22; 26-27. *See also* 26 U.S.C. 7206(1) and (2).

Defendant's claim that their acquittal on the tax fraud counts arising from Duncan's 1981 tax return, Counts 2 and 4, bars their retrial on the substantive tax fraud charges arising from Duncan's 1982 tax return on remand. The defendants were previously convicted by the jury on Counts 3 and 5 of violating 26 U.S.C. 7206(1) and (2) by willfully filing a materially

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favorable to the defendant of facts essential to conviction of the substantive offense charged on the second prosecution, and that *res judicata* was therefore a valid defense." *Ross v. United States*, 197 F.2d 660, 662 (6th Cir.), *cert. denied*, 344 U.S. 832 (1952). Here, the defendants are charged in a single indictment with multiple offenses. Principles of *res judicata* do not prohibit conviction on the substantive counts and acquittal on some or all of the others, whether for conspiracy or other substantive tax fraud charges. *See Dunn v. United States*, 284 U.S. 390 (1932).

false 1982 tax return, but their convictions were overturned on appeal based on error in the jury instructions and the case returned to this Court for retrial.[4] Defendants argue that their claim of double jeopardy is strengthened by their acquittal, not only of the conspiracy, but also of the substantive 1981 tax fraud counts. Mr. Downing asserts that "the jury's verdict of acquittal on the 1981 return was based upon a clear repudiation of the notion that the declaration of short-term capital gain in place of ordinary income constituted a false and fraudulent statement." Memorandum of Defendant Downing, Court File No. 271, at 14. Therefore, defendants argue, the only consistent conclusion that can be reached is that the 1982 return was also not fraudulently subscribed and filed, and the Government may not attempt to prove the contrary on retrial. The Court disagrees.

Defendants' theory totally ignores the very defense that they offered to the criminal charges arising from the 1981 return. As this Court previously recognized when considering defendant Downing's motion for a new trial (Court File No. 228, June 26, 1987):

> "[d]efendant Duncan's position throughout the trial was that he could not be guilty of making an[y]

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[4] "[R]eversal for trial error . . . does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant." *Burks v. United States*, 437 U.S. 1, 15 (1978).

> materially false statements in his 1981 tax return because he, in fact, had not signed a "return" for 1981. The jury was told that before either Duncan or Downing could be convicted regarding Duncan's 1981 return (counts two and four) they must find that Duncan had indeed filed a return in 1981.

Likewise, the Court's memorandum and order of June 19, 1987 (Court File No. 221), considering the defendants' motions for judgment of acquittal filed pursuant to Rule 29(c), Fed. R. Crim. P., specifically recognized the defendants' defenses to the 1981 return charges and pointed out that the jury could reasonably and rationally have acquitted the defendants of any wrongful acts regarding the 1981 return because the jury found it was an unsubscribed return, and therefore, not a proper tax return.[5]

Furthermore, the evidence surrounding the $115,704.24 "short term capital gain" entry alleged in Counts 3 and

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[5] Defendant Downing argues that he did not offer as a defense to the 1981 charges the theory that the 1981 return was unsubscribed and, therefore, not a "return." Assuming this is accurate, the Court's analysis remains applicable to Downing for double jeopardy and collateral estoppel purposes because a jury finding that the Duncan return was not legally a "return" would logically and rationally support Downing's acquittal on charges arising from the same 1981 tax return. Moreover, the jury was so instructed.

5 in connection with the 1982 return was qualitatively different from that dealing with the $200,000 "option" that spawned the entry on the 1981 return, the subject of Counts 2 and 4. Even if the jury believed that the $200,000 option was for real, it may well have concluded that the $115,704.24 entry on the 1982 return was knowingly false.[6]

The Court has previously explained in its June 19, 1987, memorandum (Court File No. 221) and in a memorandum filed June 26, 1987 (Court File No. 229) overruling Downing's motion for a new trial, that the jury's guilty verdict on counts 3 and 5 is both factually and legally supportable despite the defendants' acquittal on the counts arising from the 1981 return. This was in response to the contention of the defendants that the jury could not logically have convicted them on Counts 3 and 5 and acquitted them on Counts 2 and 4. This double jeopardy argument is essentially a rehash of the "inconsistent verdict" argument which this Court has already rejected and if it was raised in the Court of Appeals, was rejected there also. *See United States v. Duncan*, 850 F.2d at 1119.

Defendants' motion to dismiss, as well as the Supreme Court's directive in *Ashe*, 397 U.S. at 444, require this Court to determine, after considering all the circumstances of the prior proceeding and the jury's general verdict, "whether a

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[6] The $8,817.59 interest entry on the 1982 return was also a separate and distinct entry from anything that was in the 1981 return.

rational jury could have grounded its verdict upon an issue other than that which the defendant[s] seeks to foreclose from consideration." *Id.* The Court concludes here, as it did in the previous orders above-referenced, that a rational jury could have found Duncan's 1981 tax return to have been improperly filed and therefore not a "return," as strenuously argued by Duncan at trial. This finding by the jury would have required the defendants' acquittal on the substantive charges arising from the 1981 return under the Court's instructions to the jury describing the necessary elements for conviction of the offenses charged. However, this rationale does not establish any "issue of ultimate fact" that would in any way prevent retrial of these defendants on the tax fraud charges arising from Duncan's 1982 tax return. In the eyes of this Court, the defendants' acquittal on the 1981 tax return charges does not necessarily establish the jury's rejection of the Government's theory that the debt discharge transaction was fraudulent, or that Duncan's 1982 tax return could not have been materially false. The indictment and the federal tax laws clearly treat Duncan's 1981 and 1982 tax returns as separate legal documents, as did the defendants in their defense at trial. Distinct substantive offenses are charged with regard to each of those tax years, and substantial evidence at trial showed the defendants' treatment of the proceeds from the allegedly single debt discharge transaction, for tax reporting purposes, was different for the successive years. A rational jury could treat the distinct returns differently, and apparently did in this case.

The simple fact is that the issue of fraud, as it relates to Duncan's tax returns, which the defendants seek to foreclose from jury consideration in their subsequent retrial, is not the sole factual issue that necessarily supported the jury's prior acquittal on the 1981 tax return charges. The ultimate issue of fraud as to the 1982 tax return was not necessarily determined by the jury. Therefore, there can be no collateral estoppel effect attached to the prior acquittal and no double jeopardy violation. Accordingly, defendants' motions to dismiss Counts 3 and 5 on double jeopardy grounds (Court File Nos. 272 and 283) are DENIED.

In *Abney v. United States*, 431 U.S. 651 (1977), the Supreme Court held that a district court's denial of a defendant's motion to dismiss based on double jeopardy grounds is immediately appealable and that the district court loses its power to proceed from the time the defendant files his notice of appeal until the appeal is resolved. However, this divestiture of jurisdiction rule is not absolute and in certain circumstances a district court may proceed despite a defendant's filing of a notice of appeal. The Supreme Court has recently indicated "that the appealability of a double jeopardy claim depends upon its being at least 'colorable,' . . . and that 'frivolous claims of former jeopardy' may be weeded out by summary procedures, ..." *Richardson v. United States*, 468 U.S. 317, 322 (1984) (citing *United States v. MacDonald*, 435 U.S. 850, 862 (1978) and *Abney*, 431 U.S. at 662). In order for this Court's decision denying the defendants' motions to dismiss based on double jeopardy grounds to be appealable, it must be a

"final" decision on the defendants' "colorable" claim. *See* 28 U.S.C. 1291.

As the *Richardson* Court stated: "A colorable claim, of course, presupposes that there is some possible validity to a claim." *Richardson*, 468 U.S. at 326 n. 6.

While this Court disagrees with the defendants' double jeopardy contentions, this Court likewise cannot say that they do not have some possible validity. Therefore, while the defendants' double jeopardy claim may not have much color, it is nevertheless colorable, and therefore appealable under 28 U.S.C. 1291. *Richardson*, 468 U.S. 317, 322.

Because this case has been pending for a considerable length of time, further delay in its resolution is regrettable. The defendants have informed the Court that they intend to appeal this interlocutory determination. The Court would request that the parties take whatever steps are available to expedite the appeal. Meanwhile, the trial of this case will be CONTINUED, to be reset as soon as possible after the Court of Appeals issues its decision. Therefore, defendant Downing's motion to continue (Court File No. 270) will be GRANTED. As stated above, the trial of defendant Duncan will precede that of defendant Downing. The final pretrial conference heretofore schedule for 4:30 p.m., November 15, 1988, in Knoxville will, likewise, be CANCELLED. An appropriate order will enter.

R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CR-3-86-54
	)	
	)	FILED:
JOE S. DUNCAN and	)	11/14/89
MICHAL M. DOWNING	)	

O R D E R

In accordance with the accompanying memorandum filed herewith, the motions of defendants Duncan and Downing to dismiss Counts 3 and 5 on double jeopardy grounds (Court File Nos. 272 and 283) are DENIED.

Since the defendants have informed the Court that they intend to appeal this interlocutory determination, the trial of this case is CONTINUED, to be reset as soon as possible after the Court of Appeals issues its decision. Defendant Downing's motion to continue (Court File No. 270) is, therefore, GRANTED. As stated in a separate order filed this date, the trial of defendant Duncan will precede that of defendant Downing. The final pretrial conference heretofore scheduled for 4:30 p.m., November 15, 1988, in Knoxville is, therefore, CANCELLED.

SO ORDERED.

ENTER:

R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.